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(File No. 30,460.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 119.

GEORGINE ISELIN, *Appellant,*

against

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR APPELLANT.

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BRIEF FOR THE APPELLANT.

Opinion of Court Below.

The opinion of the court below appears in 59 Court of Claims Reports, 654.

It is also printed in the Record herein at pp. 31-34.

Jurisdictional Grounds.

This is an appeal from a judgment of the Court of Claims dismissing the appellant's petition for the refund of a tax paid under Section 800 (a), Paragraph (3) of the Revenue Act of 1918 (40 Stat. L. 1120). The judgment was entered May 5, 1924 (R., 24).

The question presented is whether or not the proceeds of transfers of a stockholder's license to occupy a box in the Metropolitan Opera House in the City of New York are taxable under Paragraph (3) of the Act.

The specific claims advanced, and relied upon as the basis of this court's jurisdiction, are:

> That the findings of fact of the Court of Claims do not sustain the judgment;
>
> That the Court of Claims erred in construing Section 800 (a), Revenue Act of 1918;
>
> That the Court of Claims erred in adjudging that the appellant was not entitled to recover any sum, by way of refund of the tax paid, against the United States, and in dismissing her petition; the said claim aggregating more than $3000.

The jurisdiction of this Court is invoked under Sec. 242, Judicial Code (36 Stat. L. 1157).

An appeal lies to this court from final judgments of the Court of Claims on behalf of the plaintiff where the requisite amount is involved. *In re Sanborn,* 148 U. S. 222, 225.

This appeal was taken prior to the revision of the Judicial Code by Act February 13, 1925.

The Statute.

The statute in question is as follows:

"Revenue Act of 1918, Title VIII—Admissions.

"Sec. 800 (a). That from and after April 1, 1919, there shall be levied, assessed, collected, and paid, in lieu of the taxes imposed by section 700 of the Revenue Act of 1917—

"(1) A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place on or after such date, including admission by season ticket or subscription, to be paid by the person paying for such admission;

"(2) In case of persons (except bona fide employees, municipal officers on official business, persons in the military or naval forces of the United States when in uniform, and children under twelve years of age) admitted free or at reduced rates to any place at a time when and under circumstances under which an admission charge is made to other persons, a tax of 1 cent for each 10 cents or fraction thereof of the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted;

"(3) Upon tickets or cards of admission to theaters, operas, and other places of amusement, sold at newsstands, hotels, and places other than the ticket offices of such theaters, operas, or other places of amusement, at not to exceed 50 cents in excess of the sum of the *established price therefor at such ticket offices* plus the amount of any tax imposed under paragraph (1), a tax equivalent to 5 per centum of the amount of such excess; and if sold for more than 50 cents in excess of the sum of such

established price plus the amount of any tax imposed under paragraph (1), a tax equivalent to 50 per centum of the whole amount of such excess, such taxes to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

"(4) A tax equivalent to 50 per centum of the amount for which the proprietors, managers, or employees of any opera house, theater, or other place of amusement, sell or dispose of tickets or cards of admission in excess of the regular or established price or charge therefor, such tax to be returned and paid, in the manner provided in section 903, by the person selling such tickets;

"(5) In the case of persons having the permanent use of boxes or seats in an opera house or any place of amusement or a lease for the use of such box or seat in such opera house or place of amusement (in lieu of the tax imposed by paragraph (1)), a tax equivalent to 10 per centum of *the amount for which a similar box or seat is sold* for each performance or exhibition at which the box or seat is used or reserved by or for the lessee or holder, such tax to be paid by the lessee or holder; and

"(6) A tax of 1½ cents per each 10 cents or fraction thereof of the amount paid for admission to any public performance for profit at any roof garden, cabaret, or other similar entertainment, to which the charge for admission is wholly or in part included in the price paid for refreshment, service, or merchandise; the amount paid for such admission to be deemed to be 20 per centum of the amount paid for refreshment, service, and merchandise; such tax to be paid by the person paying for such refreshment, service, or merchandise."

Statement of the Case.

The Metropolitan Opera & Real Estate Company (hereinafter referred to as the Metropolitan Company) was organized as a result of the association of certain individuals for the avowed purpose of encouraging and cultivating "a taste for music, literature and the arts" and "to give, or cause to be given, operatic or dramatic representations, concerts, balls, and other entertainments" (Record, p. 27; Findings, par. II; Record, p. 6).

To effectuate this purpose capital stock in the sum of $1,050,000, consisting of 10,500 shares of common stock, was provided, and the Company acquired the Metropolitan Opera House and other real and personal property necessary and incident to the carrying out of its expressed purposes (Record, p. 27; Findings, par. II; Record, p. 6).

The property was leased to the Metropolitan Opera Company (hereinafter referred to as the Opera Company). Under the terms of the lease the Opera Company agreed to pay an annual rental of $67,000 and to give a minimum of 60 and a maximum of 70 operatic performances in each season. The Metropolitan Company agreed to pay a subsidy of $1000 for each of such regular performances. During the operatic season in question such subsidy amounted to $70,000 and was paid (Record, p. 27; Findings, par. III).

The Metropolitan Company has never realized any annual profit, and has never distributed any profits to its stockholders (Record, p. 29; Findings, par. VIII).

To provide an additional fund to cover the financial obligations incident to the execution of the purposes of its organization, the ordinary receipts from performances of

grand opera being insufficient to support and maintain the same, stockholders obligated themselves by two agreements with the Metropolitan Company, the Guaranty Trust Company of New York, and with each other to pay assessments upon their stock up to an aggregate of $15 per share annually (Record, pp. 28-9; Findings, pars. V and VI, incorporating as a part of such findings the agreements in question, at Record, pp. 21-6, inc.).

The Opera Company further agreed in said lease to reserve at every representation of grand opera given, for the Metropolitan Company or such persons as it might designate all of the 35 boxes situated on the Parterre tier of the Opera House and to allow six free admissions for each of such boxes. All other boxes and seats to be at the disposal of the Opera Company (Record, p. 27; Findings, par. III).

The Metropolitan Company, in turn, designated the persons to use such Parterre tier boxes by a provision in its by-laws assigning a particular box to each holder of 300 shares of its stock and granting to each such holder a license for the use thereof (Record, p. 28; Findings, par. IV).

By virtue of the plan outlined, therefore, the 10,500 shares of stock were divided into 35 blocks of 300 each. The 35 boxes on the Parterre tier were then distributed among the stockholders on the basis of a box for each 300 shares. Thus the owner or owners of each block received a license for the use of a designated box on the Parterre tier and with such license six free admissions to each performance.

The appellant was the owner and holder of 300 shares of stock and as incident thereto enjoyed a license to use

Parterre box #15 and became entitled to the six free admissions to each performance, as provided in the lease (Record, p. 29; Findings, par. VII). The appellant transferred her license to use Box 15 for 47 performances during the opera season of 1919-20, receiving as a consideration therefor, in the aggregate, $9525. The details of such sales were as follows:

1 Opening night performance	$ 550
11 Monday night performances, at $275 each	3025
11 Monday night performances, at $200 each	2200
23 Friday night performances, at $150 each	3450
1 "Prince of Wales" performance, Nov. 18, 1919	300
47	$9525

(Record, p. 29; Findings, par. IX).

Pursuant to general authority contained in Section 321 of the Revised Statutes and special authority given in Section 1309 of the Revenue Act of 1918, the Treasury Department, under date of June 19, 1919, promulgated Regulations 43, Revised, Article 25, sub-paragraph (6) of which reads:

> "The owners of a certain opera house, in leasing it to an opera company, reserve for their own use the whole parterre tier of 35 six seat boxes, paying therefor annually the sum of $70,000. These boxes are distributed among the various owners, $2000 a year being paid for an annual lease of each. There are no similar boxes in the house, but the established price of each seat in the boxes in the next tier, which

> is less desirable, is $10 per seat. The number of performances during the season is fixed in advance at 100. Each lessee of such a box on paying the $2000 for the season must pay a tax of at least $600 (100 times 10% of 6 times $10), to be paid over in turn to the opera company and the Collector of Internal Revenue. This minimum figure for the tax is based on the established price of the box seats which are the most nearly similar, but which are less desirable."

December 30, 1919, the plaintiff made a return and paid a tax upon her license based upon the price of boxes in the next tier. Such return was in conformity with Regulations 43, which subjected the transaction to the tax provided by Paragraph (5) (Record, p. 30; Findings, par. XI).

Prior to the date of such return the Metropolitan Company had requested the Commissioner of Internal Revenue for a ruling with respect to the application of Section 800 (a), Revenue Act of 1918, as applied to the transactions above set forth. Under date of December 24, 1919 the Commissioner ruled that in addition to the tax imposed by Paragraph (5) any stockholder selling a ticket for admission to any of the boxes in question was likwise subjected to the tax imposed by Paragraph (3) (Record, p. 30; Findings, par. XII).

In specifying the method for computing such tax under Paragraph (3) the Commissioner ruled that the price of a box seat in the second tier (grand tier) should be taken as the established price of the appellant's box. That price, to wit, $60, was required to be deducted from the amount realized by the appellant on the transfer of her license as aforesaid and the remainder was to be taxed at the rate of 50%.

The appellant made her return and paid her tax accordingly, said return being made under protest, because of duress and in order to avoid penalty. Thereafter she duly presented her claim to the Commissioner for a refund, which was rejected (Record, pp. 30-1; Findings, pars. XII, XIV). The appellant then presented her petition to the Court of Claims, instituting the present proceedings.

Specification of Errors.

The appellant submits that the court erred in the following particulars:

1. In holding that the act of the appellant in filing a return and paying a tax upon such sale under Paragraph (5) constituted an admission that there was an established price at the ticket office for her license; and in holding that such admission rendered the sale taxable under Paragraph (3).
2. In holding that Section 800 (a), Revenue Act of 1918, required construction.
3. In construing Paragraph (3) of the Act as imposing a tax upon the sale of appellant's admission privileges.
4. In entering judgment dismissing appellant's petition.

Summary of the Argument.

I. The Findings of Fact Do Not Sustain the Court's Conclusion That the Sale Was Taxable Under Paragraph (3), Sec. 800 (a), Revenue Act, 1918.

II. The Statute Is Plain, Clear and Unambiguous and Shows No Intent to Tax the Sale of Stockholders' Boxes.

III. It Is Well Established That Statutes Plain, Clear and Unambiguous in Their Terms Require No Construction.

United States v. *Goldenberg,* 168 U. S. 95, 102-103.
11 *Ency. U. S. Sup. Ct. Rep.,* 110.
Franklin Sugar R. Co. v. *United States,* 202 U. S. 580, 582.
United States v. *Fisher,* 2 Cranch. 358, 386.
Hamilton v. *Rathbone,* 175 U. S. 414, 421.
Crawford v. *Burke,* 195 U. S. 176, 189.
Northern Securities Co. v. *United States,* 193 U. S. 197, 358-360.
Commonwealth v. *Martin,* 17 Mass. 359, 362.

IV. It Is Impossible to Compute a Just and Equable Tax under Paragraph (3) as Construed by the Court

V. The Construction of Paragraph (3) by the Court Enlarges and Extends Its Terms, Contrary to the Canons of Construction.

Insurance Co. v. *Ritchie*, 5 Wall. 541.

Folsom v. *United States*, 160 U. S. 121, 127.

United States v. *Goldenberg*, 168 U. S. 95, 102-103.

Gould v. *Gould*, 245 U. S. 151, 153.

United States v. *Field*, 255 U. S. 257, 262.

Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602, 605-606.

VI. Conclusion.

ARGUMENT.

I.

The findings of fact do not sustain the court's conclusion that the sale was taxable under Paragraph (3), Section 800 (a), Revenue Act 1918.

Paragraph (3) of Section 800 (a) imposes a tax upon tickets sold elsewhere than at the ticket office at a price in excess of the established price therefor at such ticket office.

To establish that the sales of appellant's license were subject to this tax, four facts must be found to exist:

> 1. That the sales were made elsewhere than at the ticket office.

The court has found that the sales were made by appellant through her personal agent.

> 2. The price at which the sales were made.

The court, on the admitted facts, finds this to be $9525.

> 3. That the license sold had an established price at the ticket office.

The court has not so found.

> 4. The excess of the sales price over the established price at the ticket office.

The court has not found this fact.

In lieu of the third fact the court has found the admitted fact that

> "On or about December 30, 1919, the plaintiff without protest, made a return and paid a tax thereon

under the provisions of Section 800 (a), Paragraph (5), of the Revenue Act of 1918, said return being based upon an admission price of $60 per performance" (Record, p. 30).

As a conclusion of law the court has held that when the appellant voluntarily acquiesced in the provisions of the Regulations ruling that the price of the most nearly similar box should be the basis of a tax on her box under Paragraph (5), such price "necessarily became the established price upon which to base the tax imposed by Paragraph (3)" (Record, p. 33).

In lieu of the fourth fact the court has construed Paragraph (3) as imposing a tax upon the excess of the sales price over the price which appellant has conceded may be used as the basis of tax under Paragraph (5).

The court errs in two particulars.

First. The fact is found as an alleged admission of the appellant. The admission does not have the effect ascribed to it by the court.

Treasury Regulations 43, (*supra,* p. 7) recited that there were no boxes similar to the parterre boxes, that boxes in the next tier above them were less desirable but most nearly similar, and ruled that parterre boxes were taxable upon the price of such most nearly similar boxes.

Appellant complied with the Regulations by making her return and paying the tax prescribed therein.

Paragraph (5) imposes a tax upon a distinct and specifically described class of admissions having no established price, and adopts as the basis of tax the price for which similar seats are sold. In paying a tax assessed under Paragraph (5) pursuant to Treasury Regulations 43, ap-

pellant admitted only that which was prescribed in the Regulations, namely, that she was the lessee of a parterre box; that there were no boxes similar to parterre boxes; that the boxes in the next tier were most nearly similar and sold for $60; and she consented to pay a tax on such minimum figure without protest.

This is not an admission that there was an "established price" for her box at the ticket office or elsewhere. Nor is it an admission or consent that Paragraph (3) may be so construed as to adopt such "minimum figure" as the basis for a tax upon a sale of the right to use her box, as distinguished from the tax under Paragraph (5) upon her rights in the box.

SECOND. To give effect to the alleged admission the court construes Paragraph (3).

The soundness of the conclusion as to the effect of the alleged admission depends, therefore, upon the validity of the construction. If the construction of the statute is invalid, the conclusion as to the effect of the alleged admission falls. That the construction placed upon Paragraph (3) by the Court of Claims is invalid is hereinafter demonstrated.

II.

The statute in question is plain, clear and unambiguous, and shows no intent to tax the sale of stockholders' boxes.

The terms of the statute are clear, explicit and unequivocal. It distinctly describes various classes of admissions and sales thereof. A distinct tax is provided for each class and each sale.

The statute provides for the following:

Paragraph (1): A general tax of 10% upon all paid admissions; to be paid by the purchaser.

Paragraph (2): A tax upon free or reduced rate admissions at the rate of 10% of the price charged other persons for the same or similar accommodations; to be paid by the person admitted.

Paragraph (3): An additional tax upon all paid admissions having an established ticket office price, when the tickets are sold outside of the ticket office at excess prices. This tax is to be paid by the seller.

Paragraph (4): A tax upon sales of tickets by proprietors, managers or employees equivalent to 50% of the amount by which the sales price exceeds the regular or established charge; to be paid by the seller.

Paragraph (5): A tax of 10% upon admissions,—distinguished from paid admissions—to persons having the permanent use or lease of boxes; the tax to be computed upon the amount for which

a similar box is sold and to be paid by the lessee or holder.

Paragraph (6): A tax upon admissions to cabarets, etc.; the tax to be computed upon an arbitrary percentage of the charge for refreshment service, etc., and to be paid by the person admitted.

In each case the class of admission taxed, the basis of the tax and the person required to pay the same are painstakingly described.

Under Paragraph (3) one who sells an admission ticket at a place other than the ticket office pays, as a tax, a fixed percentage of the amount by which the price received exceeds "the sum of the established price therefor at such ticket office plus the amount of any tax imposed under Paragraph (1)."

Under Paragraph (5) one who has the permanent use, or lease for the use, of a box pays a tax of 10% of "the amount for which a similar box * * * is sold."

A Parterre boxholder sells her right to the use of the box. Are the proceeds of the sale subject to a tax under Paragraph (3)? It is perfectly clear that Paragraph (3) does not so provide.

In the first place Paragraph (3) provides for a deduction, from the sales price, of the established price of the ticket at the box office. Congress was aware that there was no established price for leased boxes. It said so in Paragraph (5), where it taxed the boxholder's right to admission, by providing that the basis of the tax should be "the amount for which a similar box * * * is sold."

In the second place, Paragraph (3) provides for a deduction, from the sales price, of "the amount of any tax

imposed under Paragraph (1)." Congress was aware that a boxholder paid no tax under Paragraph (1). It said so in Paragraph (5) by providing solely for a tax against boxholders "in lieu of the tax imposed by Paragraph (1)."

Paragraph (3), by its plain terms, deals with tickets of admission, having an established price at the theater ticket office, which are taken outside of the ticket office and sold at a price in excess of the sum of the established ticket office price plus the Paragraph (1) tax. Its terms are wholly inappropriate to cover a class of admissions which are never sold at the box office, have no established price there, and bear no tax under Paragraph (1).

Congress provided that every person who paid for admission to a place of amusement should pay a tax.

It provided that whenever the ticket was acquired from the box office and resold to another the seller should pay an additional tax, based upon the excess of the amount he received over the sum of the amount he had paid for the ticket plus the amount he had paid as a Paragraph (1) tax.

It provided that when the proprietors of a theater sold a ticket in excess of the regular established price they should pay one-half of such excess. No mention is made of a deduction for a Paragraph (1) tax—this for the obvious reason that it is an initial sale by those managing the theater.

It provided that persons admitted free should pay a tax based upon the price of the same or similar accommodations.

It provided that persons admitted to cabarets, where the admission price could not be distinguished from the refreshment price, should pay a tax upon an admission price arbitrarily determined.

It provided that boxholders whose admission did not result from the purchase and sale of a ticket but rather from the right to a permanent use of a box or from a lease thereof, should pay a tax based upon the amount for which a similar box was sold. Had the intention been to impose a tax upon the sale by a boxholder of the admission privilege the intention could readily have been expressed by appropriate terms in Paragraph (3), or in an additional paragraph.

No difficulty was experienced in describing the several classes of admission or the particular sales of tickets subject to tax. Although providing a tax upon the privilege of enjoying the use of boxes, the statute does not, either directly or by implication, provide for a tax upon the sale of their privileges by boxholders. Whether such omission may be supplied by the courts is a question to be answered by the application of the principles of construction.

III.

It is well established that statutes plain, clear and unambiguous in their terms require no construction.

The decision of the Court of Claims, sustaining the contentions of the Government, appears to be an attempted application of the doctrine that statutes must be construed so as to effect the legislative intent; at all events, such was the burden of the Government's argument and the main subject of discussion in the Court's opinion.

As to the correctness of the proposition of law there can be no dissent. The fallacy of the decision is that it assumes that Section 800 (a) requires construction. Although advancing no reason therefor, in effect, the Court amends Paragraph (3) by construction in order to give effect to its conception of an unexpressed legislative intent. In so doing, it disregards the primary rule that the intent of the legislature is to be found in the language of the statute.

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent." *United States v. Goldenberg,* 168 U. S. 95, 102-103.

The court argues that since there are no terms in Paragraph (5) exempting the sale of boxholders' licenses from taxation under Paragraph (3) it must have been intended that they should be so taxed. This is a complete *non-sequitur.*

Surely, the mere facts that the provisions of Paragraph (3) are inappropriate to subject such transactions to a tax, and that the provisions of Paragraph (5) do not exempt them from the terms of Paragraph (3), do not invoke construction. They do not give rise to any ambiguity. They are consistent and make for clarity. Hence, there is no occasion for construction, and the Court will decline to legislate.

In *11 Ency. U. S. Supreme Court Reports,* p. 110, the principle is stated as follows:

> "Where a statute is expressed in plain and unambiguous terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Where the intent is plain, nothing is left for construction. The province of construction lies wholly within the domain of ambiguity."

To the proposition above stated, more than thirty cases in this court are cited, together with other cases expressing the same rule in different terminology.

Referring to a few of the cited cases, we find a very clear expression and a very definite application of the rule. In *Franklin Sugar R. Co.* v. *United States,* 202 U. S. 580 (at p. 582) the court said:

> "The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption."

The statement above quoted, *i. e.*, "Where the intent is plain, nothing is left to construction", is found in the opinion of Chief Justice Marshall in *United States* v. *Fisher,* 2 Cranch, 358 (p. 386).

In *Hamilton* v. *Rathbone,* 175 U. S. 414 (p. 421) the court said:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create, an ambiguity."

And the court refused to resort to such prior acts to discover the legislative intent.

In *Crawford* v. *Burke,* 195 U. S. 176 (p. 189), the court said:

> "The language of this section is so clear as to require no construction."

The doctrine was exhaustively discussed by Harlan, J., in *Northern Securities Co.* v. *United States,* 193 U. S. 197 (pp. 358-60).

In commenting upon the rule it was there stated:

> "It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention by the words used" (p. 358).

Further, quoting Chief Justice Marshall, it was said:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction" (p. 358).

The opinion also adopts the language of the Massachusetts Court, in *Commonwealth* v. *Martin,* 17 Mass. 359, 362, as follows:

> "It is not justifiable in this, any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to preclude the exercise of ingenuity in raising doubts about its construction."

IV.

It is impossible to compute a just and equable tax under Paragraph (3) as construed by the court.

A practical application of the statute as construed by the Court of Claims demonstrates the error into which it has fallen.

For illustration, consider a theater ticket selling at the ticket office for $3.00. The purchaser must pay, in addition, the Paragraph (1) tax of 30 cents. Assume that the purchaser resells the ticket at some place other than the ticket office for $4.00.

This resale is taxable according to the plain terms of Paragraph (3). The tax is computed as follows:

Sales price other than at ticket office		$4.00
"Established price therefor at such ticket office"	$3.00	
"Tax imposed under Paragraph (1)"	.30	
"Sum" of above		3.30
"Excess"		.70
Tax at 50% of Excess		.35

Compare with this a computation of the tax upon the sales of the right to use appellant's box. The computation is that prescribed in the Commissioner's ruling (Statement of The Case, p. 8). The construction of the statute is that adopted by the Court of Claims herein.

The first factor is the sales price at some place other than the ticket office. The appellant, through her agent, sold the use of her box for 47 performances for $9525.

The next factor is the sum of two figures. The first figure is "the established price therefor at such ticket office." This figure does not exist. Parterre boxes are not sold at the ticket office and have no established price there, or elsewhere.

To supply this figure the court finds that boxes in the tier above were "substantially similar" to parterre boxes and sold for $60; that the Government adopted this as the basis for appellant's tax under Paragraph (5); that the appellant paid that tax without protest; and concludes that $60 necessarily became the established price upon which to base the tax imposed by Paragraph (3).

As prescribed by Congress in Paragraph (3), the computation was to be made upon,

> "The sum of the established price therefor at such ticket offices plus the amount of any tax imposed under Paragraph (1)."

As Paragraph (3) has been construed and amended by the Court of Claims it reads:

> "The sum of the established price therefor at such ticket offices, *or if there be no such established price therefor at such ticket offices, then the amount for which a substantially similar box is sold, or the amount which may have been used by a boxholder in making a return in compliance with Treasury Regulations 43,* plus the amount of any tax imposed under Paragraph (1)."

Only in this way is the first figure supplied.

The second figure is also missing. The court does not undertake to supply it. It ignores it. As it is a credit

to which all others, paying a tax under Paragraph (3), are entitled, it would seem to be important. This figure is the amount of any tax imposed under Paragraph (1). Leased boxes pay no tax under Paragraph (1).

Such boxes do, however, pay a tax of 10% upon the price of a similar box. The rate under Paragraph (1) is 10%. There would seem to be no reason for depriving boxholders of a credit on account of the payment of such tax. To do so results in taxing boxholders at a higher rate than others under the same paragraph of the statute. But such is the decision of the Court of Claims.

Under the statute as so construed by the Court of Claims, the tax against Parterre boxholders, applied to the case at bar, is computed as follows:

Sales price other than at ticket office (47 performances)		$9,525.00
"The amount for which a substantially similar box or seat is sold" (in lieu of the figure prescribed by the statute, i. e., "the established price therefor at such ticket offices.") 47 @ $60	$2,820.00	
Tax under Paragraph (1) (non-existent and ignored by the court)	000.00	
"Sum" of above		2,820.00
"Excess"		$6,705.00
Tax at 50% of Excess		3,352.50

V.

The construction of Paragraph (3) by the court enlarges and extends its terms, contrary to the canons of construction.

It sufficiently appears from the foregoing that the court has not found the appellant's sales to be within the terms of Paragraph (3), and in order to sustain the tax as imposed has added to the section the terms which it deems necessary for that purpose.

No well-defined theory is presented to justify this result. The court says, "it was not assumed that such persons would sell tickets for these boxes" (Record, p. 33). But it concludes that it was just such sales that were intended to be taxed. The Government argued that the general purpose of Congress was to tax all sales.

From any viewpoint, however, it is clear that the judgment is contrary to the well established canons of construction.

In *Insurance Co.* v. *Ritchie,* 5 Wall. 541, the repeal of the statute, if enforced according to its terms, had the effect of depriving the federal court of jurisdiction over pending as well as other suits respecting actions involving the internal revenue statutes, in the absence of diversity of citizenship. It left the federal courts with jurisdiction over cases involving questions under the customs revenue statutes irrespective of diversity of citizenship. The Court said (pp. 544, 545):

> "It is quite possible that this effect of the Act of 1866 was not contemplated by Congress. • • • It is certainly difficult to perceive a reason for dis-

> crimination between such suits and suits under the internal revenue laws; but when terms are unambiguous we may not speculate on probabilities of intention."

In *Folsom* v. *United States*, 160 U. S. 121, certain federal statutes, if literally interpreted, provided for greater rights of appeal from convictions for minor offenses than were provided for appeals from convictions for capital offenses. A construction of the statutes was sought upon the theory that Congress could not have intended such a result. In passing upon the question this Court said:

> "It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it, modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the Court to expound the statute as it stands. As far as Congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that Congress should have gone farther and given by this Act a second review in this Court in cases of convictions for capital and infamous crimes in the Territories. It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the 15th section as carrying appellate jurisdiction over such cases to the Circuit Courts of Appeals, and so enlarging that jurisdiction into something other and different from 'the same appellate jurisdiction' as is exercised in reviewing the

> judgments of District and Circuit Courts under Section 6 of the Act." (p. 127).

In *United States* v. *Goldenberg*, 168 U. S. 95, an Act of Congress provided that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise should be final and conclusive, unless the interested parties should, within ten days after such decision, or within ten days after the payment of the duties, give written notice of objections thereto, adding in the same sentence:

> "and if the merchandise is intended for consumption shall pay the full amount of the duties."

The statute further provided that upon such notice and payment the objection should be certified to a reviewing body and passed upon by it.

The question certified to the Supreme Court was whether or not both the payment and the giving of notice within ten days after the decision of the collector were conditions precedent to a review of the objections.

Looking outside of the statute it was clearly demonstrated that the intent of Congress was to compel the prompt decision upon objections to the duty and the prompt payment of the tax. Construed literally, the importer was enabled to file his objections within ten days after the decision of the collector and refrain from paying the duty. The objections could not be certified to the reviewing board until payment was made, and the goods having been delivered into the possession of the importer, payment could be indefinitely deferred and until the recovery thereof by the Government in a plenary suit. This situation was directly contrary to the intent of Congress to be found outside of the statute itself.

To give effect to such intent it was necessary to construe the statute by adding a requirement that payment as well as the giving of notice should be made within ten days of the collector's decision. The Court said (pp. 102-103):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense; Holy Trinity Church *v.* United States, 143 U. S. 457; it involves no injustice, oppression or absurdity, United States *v.* Kirby, 7 Wall. 482; McKee *v.* United States, 164 U. S. 287; there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally with protest follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them. Certainly, there is nothing which im-

peratively requires the Court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition."

The rule of construction just examined applies with even greater force and strictness to statutes levying taxes. As to such statutes, the courts are especially reluctant to indulge in construction in the absence of patent ambiguity and will not extend or enlarge the statutes so as to impose a tax where none is specified therein.

In such cases the rule as stated in *Gould* v. *Gould* 245 U. S. 151 (p. 153) is:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. *United States* v. *Wigglesworth,* 2 Story, 369; *American Net & Twine Co.* v. *Worthington,* 141 U. S. 468, 474; *Bensiger* v. *United States,* 192 U. S. 38, 55."

This rule was affirmed in *United States* v. *Field,* 255 U. S. 257, 262. Here the Government sought a construction of the Revenue Act of 1916, providing for inheritance taxes, justifying the imposition of a tax upon the execution of a power of appointment. In applying the rule above quoted, the court said (p. 264):

> "It would have been easy for Congress to express a purpose to tax property passing under a general power of appointment exercised by a decedent had such a purpose existed; and none was expressed in the act under consideration."

In *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, the question presented for decision was "Whether under the income tax law of 1913, income held and accumulated by a trustee for the benefit of unborn and unascertained persons was taxable." The Court was asked to construe the statute so as to require payment of the tax by the fiduciary upon the income of beneficiaries not *in esse*. Chief Justice Taft said (pp. 605, 606):

> "No language in the act included a tax on income received by a trustee by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing paragraph A the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication."

In the last two cases nothing could have been clearer than the Congressional intent. In the first, that intent was

to impose a tax upon the devolution of title by inheritance. It did not occur to Congress to specifically provide for a tax upon deferred powers of appointment. Although the estate in question would escape taxation entirely, the court refused to extend or enlarge the statute.

In the second case, the Congressional intent was to tax the income of *cestuis*. It neglected to provide for the income of unborn and unascertained *cestuis*. This court refused to extend or enlarge the statute to include such income.

From these cases, two principles conclusively appear:

1. Where a statute is clear and unambiguous no mere omissions will be supplied by judicial construction.
2. Where the language of the statute is inappropriate to impose a tax upon the *res* in controversy, the court will not extend or enlarge the statute to include it, even though it be within the general legislative intent.

These principles require a reversal of the judgment of the Court of Claims.

VI.

Conclusion.

The facts found by the court can be held to sustain a tax against appellant under Paragraph (3) only when her tax return under Paragraph (5) is taken as an admission of liability under Paragraph (3). The tax return has no such legal effect.

Under the findings, the court has written into the statute a provision which it does not contain. The statute, being plain, clear and unambiguous, is not open to construction; and the construction indulged, amplifying the statute in favor of the Government, is contrary to the well established principle of law that statutes imposing taxes will be construed in favor of the taxpayer.

The judgment should be reversed and remanded to the Court of Claims with direction to enter judgment for the appellant upon her petition.

Respectfully submitted,

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